Nos. 20121, 20122

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and L. E. DIXON COMPANY, *Appellants,*

vs.

VAN HARRIS, an individual, doing business as Harris & Sons, *Appellee.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and L. E. DIXON COMPANY, *Appellants,*

vs.

PARAMOUNT TRUCK RENTAL, INC., and VAN HARRIS, an individual doing business as Harris & Sons, *Appellees.*

PARAMOUNT TRUCK RENTAL, INC., *Appellant,*

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and L. E. DIXON COMPANY, *Appellees.*

Reply Brief of Appellants L. E. Dixon Company and Fidelity and Deposit Company of Maryland.

THELEN, MARRIN, JOHNSON & BRIDGES,
811 West Seventh Street,
Los Angeles, California,
Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases — Page

Textbooks

Nos. 20121, 20122

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and L. E. DIXON COMPANY, *Appellants,*

vs.

VAN HARRIS, an individual, doing business as Harris & Sons, *Appellee.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and L. E. DIXON COMPANY, *Appellants,*

vs.

PARAMOUNT TRUCK RENTAL, INC., and VAN HARRIS, an individual doing business as Harris & Sons, *Appellees.*

PARAMOUNT TRUCK RENTAL, INC., *Appellant,*

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and L. E. DIXON COMPANY, *Appellees.*

Reply Brief of Appellants L. E. Dixon Company and Fidelity and Deposit Company of Maryland.

I.

STATEMENT OF THE CASE.

The Statement of Case in the Reply Brief of appellee Paramount Truck Rental, Inc. (hereinafter referred to as "Paramount") requires the following comments:

The second subpart of paragraph 2 of appellee's Statement of Case (Reply Br. p. 3, first paragraph)

quotes out of context a portion of the specifications of the contract between the California Institute of Technology (hereinafter referred to as "Cal Tech") and L. E. Dixon Company (hereinafter referred to as "Dixon"). The full quotation of that portion of the specifications is as follows:

"61. WARRANTY:

a * * *

b *All Subcontractors', manufacturers', or suppliers'* equipment used in or a part of the work (whether on equipment of the nature above specified or otherwise) shall be deemed obtained by the CIT as the agent of the Government and all such warranties and guarantees shall inure to the benefit of the Government without the necessity of separate transfer or assignment thereof. Submit all written guarantees to JPL. The Contractor shall require such Subcontractors, manufacturers, or suppliers to execute such warranties and guarantees in writing to the Government." [Part 3, Div. 2, paragraph 61(b), pp. 23-24; Plft. Ex. 8.]

This specification is obviously limited in its effect to warranties and guarantees, and was not intended to create a general agency relationship between Cal Tech and the United States Government.

Paragraph 6 (Reply Br. p. 4) states that the agreement between appellee Van Harris (hereinafter referred to as "Harris") and Andrew Franklin Yost (hereinafter referred to as "Yost") [Pltf. Ex. 4] was entered into

two weeks prior to the date Harris returned the signed contract between appellant Dixon and Harris [Pltf. Ex. 3]. The Harris-Yost agreement is dated June 22, 1962, and the Dixon-Harris contract was returned to Dixon with a letter from Harris dated June 20, 1962 [Pltf. Ex. 5]. Nothing in the record indicates that those dates do not represent the actual dates of execution and transmittal of the respective documents and hence the appellee's assertion and the District Court's finding to the contrary are without basis.

In paragraph 10 (Reply Br. p. 5), Paramount asserts that Harris could not have "supervised" the work since he had no control over Yost. Appellants' statement that Harris was supervising the work is based on Harris' testimony [R. T. Vol. 1, p. 44, line 13, to p. 45, line 8], while Paramount bases its assertion to the contrary upon testimony which was stricken from the record on Paramount's motion [R. T. Vol. 1, p. 46, line 16, to p. 47, line 22]. Legally, Harris had no right to control Yost's method of performance of his subcontract, except as provided by the contract documents, since Yost was an independent contractor. *Green v. Soule* (1904), 145 Cal. 96, 78 Pac. 337, 26 Cal. Jur. 2d, *Independent Contractors,* §2, p. 397. In addition, Paramount's direct dealings with Dixon were in accordance with the custom of the industry, wherein sub-subcontractors often deal directly with the prime contractor [R. T. Vol. 1, p. 115, lines 6-25].

II.
ARGUMENT.

A. Dixon Was Not "the Contractor" Within the Meaning of the Miller Act.

Paramount apparently rests its claim that Dixon was the "Contractor" under the Miller Act solely on the case of *United States v. Harder Industrial Contractors, Inc.* (D.C. Or. 1963), 225 F. Supp. 699, which case, Paramount contends,

> "... patently stands for the proposition than for the purpose of the Miller Act, the person who furnishes the performance bond is to be treated as the contractor for the purpose of determining whether or not the use plaintiff has a sufficient nexus therewith." (Reply Br. p. 14).

The *Harder* decision, in fact, stands for no such broad proposition. The result in that case was based upon finding by the court that Kaiser Engineers was the "supervisory agent" of the AEC. This finding of an agency relationship was, of necessity, based upon the particular factual situation presented. It is unfortunate that the court in *Harder* failed to outline the facts upon which the relationship was based, but it is respectfully submitted that the facts in the present case in no way show that Cal Tech was acting as a mere agent of the Government. The court's attention is invited to Article I(a) of the Contract between the United States and Cal Tech [Pltf. Ex. 1], wherein the parties thereto agreed that Cal Tech was an independent contractor and not an agent of the United States. Paramount has not, and cannot, point to any evidence in the record upon which to base a finding that Cal Tech was the "supervisory agent" of the Government.

The rule advanced in *Harder* that a supervisory agent should be ignored for the purposes of the Miller Act would seem to be an incorrect interpretation of that Act. That rule is apparently based on the theory that the actual performance of physical labor is the important criterion and that supervision of the work or financial responsibility for the performance of the work is irrelevant. This theory is deficient in that, in every chain of contractors, only one contractor can perform the actual labor. To ignore all the remaining contractors would, in effect, overrule *Clifford F. MacEvoy Co. v. United States* (1944), 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163. Surely supervision of the work by Cal Tech and financial responsibility for the results should be adequate for the purpose of *Clifford F. MacEvoy Co. v. United States, supra.*

B. Paramount Is Too Far Removed From the General Contractor to Be Within the Protection of the Miller Act Bond.

Paramount contends that the decision in *Clifford F. MacEvoy v. United States, supra,* should not apply to the instant case (Reply Br. pp. 15-17). With one exception, however, every court considering this particular point has applied the *MacEvoy* decision to deny relief to suppliers such as Paramount. The one exception is *McGregor Architectural Iron Co. v. Merritt-Chapman & Scott Corp.* (M.D. Pa. 1957), 150 F. Supp. 323, relied upon by appellee. This case has been widely criticized; see *e.g. Aetna Ins. Co. v. Southern Waldrup and Harwick* (N.D. Calif. 1961), 198 F. Supp. 505; *United States v. Deschesnes Constr. Co., Inc.*, (D.C. Mass. 1960), 188 F. Supp. 270; *United States v. Idaho Crane and Rigging Co.* (D.C. Idaho 1961), 193

F. Supp. 802; it has been cited with approval only once to appellants' knowledge, in *United States v. Pinole* (D.C. Calif. 1959), 171 F. Supp. 87, a case which was later disapproved in *Aetna Ins. Co., supra,* by the same judge that wrote the opinion in *Pinole*. Thus, it is submitted that *McGregor Architectural Iron Co., supra,* should be given no weight at all in determining the question presented in the instant case.

C. Proof of a Promise by Dixon to Indemnify Paramount for the Cost of Material and Labor Which Yost Would Not Pay for Is Barred by the California Statute of Frauds.

On pages 18 and 19 of the Reply Brief, Paramount attempts to show that the statute of frauds does not bar proof of Dixon's alleged promise to pay for materials and labor which Yost would not pay for. The first part of Paramount's argument is based on the contention that Yost was never obliged to pay for the labor and material allegedly furnished at Dixon's request. At the trial, Paramount's Mr. Dick testified as follows:

> "A. Mr. Meyers called our dispatcher requesting equipment. Our dispatcher turned the telephone call over to me, and Mr. Meyers then requested certain equipment to be sent to the job.
>
> I told Mr. Meyers that the job was in a dispute and that—
>
> The Court: That the job was what?
>
> A. There was a dispute on the job, and that I could no longer send equipment up there *because Mr. Yost would not allow it.* Mr. Meyers said, well, he needed the equipment, and I said, well, what I would do, I would contact Mr. Yost and *if Mr.*

Yost would O.K. it I would send the equipment providing that if Mr. Yost did not pay the bill that he would authorize Dixon Company, and he said that he would authorize the Dixon Company to pay the bill if I didn't receive payment from Mr. Yost.

By Mr. Floum:

Q. And as a consequence of that telephone conversation, was equipment sent to the job?

A. Yes." (Emphasis added). [R. T. Vol. 1, p. 66, line 15, to p. 67, line 8].

The phrase "because Mr. Yost would not allow it" can only mean that Yost had refused to pay for equipment sent to the job, since Yost would have neither reason nor right to forbid Paramount from supplying equipment to the job. Similarily, the phrase "if Mr. Yost would O.K. it" can only mean that Paramount would send the equipment if Yost would promise to pay for it. Equipment was sent to the job and hence the inference is that Yost did promise to pay for it. Since Yost was contractually bound to pay for the equipment, Dixon's alleged promise is barred by the statute of frauds.

Paramount's other contention with regard to the statute of frauds is that the promise sued upon is a "fully performed" oral contract. If that were true, then Paramount would obviously have no claim for the $431 alleged to be owed by Dixon. Additionally, any claim by Paramount that there was part performance of the alleged oral agreement would not prevent application of the statute of frauds since "the mere rendition of services is not usually such a part performance of an oral contract as will relieve the contract of the operation of the statute [of frauds]." *Gressley v. Williams* (1961), 193 Cal. App. 2d 636, 14 Cal. Rptr. 496. Also,

part performance of an alleged promise to answer for the debt of another can never be sufficient to take the promise out of the statute of frauds since such part performance cannot constitute unequivocal evidence of such promise. This rule is stated in 23 Cal. Jur. 2d, *Frauds, Statute of,* Section 129, page 400:

> "To remove an oral contract from the operation of the statute of frauds, the acts of performance relied on for that purpose must be unequivocally referable to the oral agreement alone. * * * The acts relied upon must clearly appear to have been performed in pursuance of a particular contract itself and not because of the existence of some other contractual relationship or from some other reason. It is not enough, therefore, that the acts of part performance relied on amount to evidence of some contractual agreement. The acts in question must constitute unequivocal and satisfactory evidence only of the contract sought to be removed from the operation of the statute."

See also, *American Casualty Co. v. Curran Productions, Inc.* (1963), 212 Cal. App. 2d 386, 28 Cal. Rptr. 131. In light of Paramount's past contracts with Yost, and in light of the fact that Yost had an existing contract to perform the services Paramount performed, it is evident that Paramount's actual performance points with equal force to a contract with Yost as to a contract with Dixon. Hence, by the above rule, Paramount's part performance is insufficient to take the alleged oral agreement with Dixon out of the prohibition of the statute of frauds.

D. Dixon's Alleged Contract With Paramount Does Not Make Dixon Liable for Paramount's Contracts With Yost.

In its Reply Brief, Paramount advances the novel theory that Dixon's alleged contract with Paramount for the latter to perform services of the value of $431 makes Dixon liable for over $8,000 worth of services rendered by Paramount to Yost (Reply Br. pp. 19-20). Adoption of such a rule would make it extremely risky if not impossible for a prime contractor to enter into contracts with any of the subcontractors or materialmen on the job after they had performed any work for any one else on that same job. It should be noted that the decision in *Noland Co. v. Allied Contractors, Inc.* (4th Cir. 1959), 273 F. 2d 917, relied upon by Paramount, simply held that certain statutory obligations were not barred by failure to file a claim in time. In our case, Paramount is asking this Court to create a *direct contractual obligation* for $8,299.78 against Dixon, which obligation did not previously exist. Moreover, Paramount is asking this Court to hold that contracts between Paramount and Yost and an alleged contract between Paramount and Dixon be treated as one contract, and to hold Dixon liable for the total amount. In *Noland, supra,* the court only held that a number of contracts with the *same contractor* were, in effect, one contract for the purpose of the technical defense of a late filed notice. It is respectfully submitted that Paramount can show no authorities, by analogy or otherwise, which support the proposition that the alleged contract for $431 worth of services renders Dixon liable for over $8,000 worth of services *previously rendered by Paramount to a different contractor.*

E. Conferences Between Employees of Paramount and Dixon Cannot Create an Implied Obligation for Services Rendered to Another.

On page 21 of the Reply Brief Paramount contends that direct dealings between employees of Dixon and employees of Paramount created an "implied contract" to pay for services rendered. This contention is amply refuted by Paramount's own witness, who stated that it is the practice for subcontractors to confer with the job superintendent of the general contractor [R. T. Vol. 1, p. 103, lines 7-25]. Such a rule would make it impossible for the general contractor to synchronize the work of the subcontractors, as is the general custom [R. T. Vol. 1, p. 103, lines 7-12].

F. Paramount Is Too Far Removed From the General Contractor to Be Within the Protection of the Miller Act Bond.

On pages 21 through 27 of the Reply Brief Paramount cites a number of cases in support of its "paper subcontractor" theory. In *Fine v. Travelers Indemnity Co.* (W. D. Mo. 1964), 233 F. Supp. 672 (cited in Reply Br. p. 23), S. S. Silberblatt, Inc., contracted with the Government to construct military housing. The defendants alleged that Silberblatt then subcontracted the work to Sterling Brukar, Inc., who subcontracted with Conner, who in turn subcontracted with the use plaintiff. Actually, the facts showed that *no subcontract had ever been entered into between Silberblatt and Sterling Brukar*. The court in *Fine* discussed the facts and explained its holding as follows:

> "It is, of course, true that certain moneys were routed through the corporate books of Sterling

> Brukar, Inc., but that corporation had no money or risk in the 'contract' it allegedly 'negotiated'. *It existed only in the mind of the joint president of the two family corporations* [S. S. Silberblatt and Sterling Brukar, Inc.] It was never reduced to writing and was but a creation of convenience of one man, S. S. Silberblatt, who supposedly acted simultaneously for both corporations. *We hold that such a relationship is not the sort of contractual relationship legally intended to limit liability* on a bond required by federal law." (*Id.* at 682) (Emphasis added).

In addition to this finding, the court also found that, as to the alleged subcontract between Sterling Brukar and Conner,

> "The parties involved merely made a deal under which Conner, without any financial responsibility, stood a change to share the difference between the payments that would be received by the prime contractor for the portion of the work that Conner was supposed to do and the cost of that work which would be borne by moneys furnished by persons other than Conner.
>
> "Legally, such an agreement could well be labeled a 'joint venture'; in the construction industry such deals are sometimes called just that . . ." (*Id.* at 682).

It should be noted that the court, in speaking of the "parties involved" in the quotation, above was referring to Silberblatt and Conner, since it had already dispensed of Sterling Brukar as a fictitious party. Thus, the court was in effect saying that the agreement between Sil-

berblatt and Conner was never intended to be a subcontract, but rather was in the nature of a joint venture whereby Conner was to perform the work and Silberblatt to contribute the financial backing. This is well pointed up by the statement of the court, that:

> "The Silberblatt organization knew from the outset that Conner could not possibly perform on his own financial ability *and the agreement between them accurately reflected that fact.* Even on paper, Sterling Brukar, Inc., was to be the banker for the work that was to be performed by Conner, although the other facts clearly establish that Sterling Brukar, Inc., was acting only as a shadow for S. S. Silberblatt, Inc., in making that financial commitment. *S. S. Silberblatt, Inc., through its president, knew exactly who was financially responsible* from the outset and defendant bonding company, of course, is presumed to have had that same knowledge." (*Id.* at 682) (Emphasis added).

The factual situation of the *Fine* case, when completely stated, bears not even the faintest resemblance to the case at hand. There, the alleged subcontract between Silberblatt and Sterling Brukar was not committed to writing, and, as the court found, existed only in the mind of one individual—the joint president of both corporations; in the instant action, by contrast, the subcontract between Dixon and Harris was a written, arms-length agreement between two entirely independent parties. There, the contract between Sterling Brukar and Conner was found to be an agreement in the nature of a joint venture between Silberblatt and Conner under which Conner assumed no financial responsibility; in the instant action, however, the subcontract between

Harris and Yost presented none of the elements of a joint venture agreement (Op. Br. pp. 20-21), carried with it full financial responsibility on the part of Harris, and was unknown to Dixon until after it was executed (Reply Br. p. 5, paragraph number 9). It is therefore submitted that *Fine v. Travelers Indemnity Co. supra,* has no bearing on the case now before the court.

In *United States v. Ft. George G. Meade* (D.C. Md. 1960), 186 F. Supp. 639 (cited in Reply Br. p. 24), Miller entered into a contract with the Government under which he was designated the "eligible builder." This original contract named McCloskey as the "principal subcontractor" and authorized Miller to sublet the whole of the contract to McCloskey. Miller did, in fact, sublet the entire contract to McCloskey and agreed to pay him $16,500,000, the identical contract price for which Miller had agreed to perform the original contract. McCloskey then subcontracted a portion of the work to Acme who in turn subcontracted a portion to the use plaintiff.

The case came up on a motion to dismiss by defendants on the ground that the use plaintiff was too far removed from the prime contractor to recover under the Capehart Act bond. The use plaintiff, on the other hand, alleged that McCloskey rather than Miller was the prime contractor either on the theory that there was a "complete assignment of the Housing Contract" (and not merely an assignment to McCloskey of Miller's *responsibilities*) or that the agreement between Miller and McCloskey was a joint venture.

The holding of the court was that, since for purposes of the motion it had to accept the allegations of

assignment and joint venture as true, the motion to dismiss should be denied. The court, as *dictum,* stated

> ". . . and with the recital in the housing contract in regard to McCloskey's financial responsibility and experience it would appear that the Department was looking to McCloskey as the one who was to do the work and intended and agreed that there would be a complete substitution of McCloskey for Miller. . . ." (*Id.* at 650).

The *Ft. George G. Meade, supra,* decision is of no substantive value to the question presented here, since the court in that case, for purposes of the motion, was assuming the existence of a joint venture or novation.

Again, *Continental Casualty Co. v. United States* (5th Cir. 1962), 308 F. 2d 846 (cited in Reply Br. p. 25), has no bearing on the present action. There is no evidence to support the conclusion that the Dixon-Harris subcontract was a sham transaction such as was found in *Continental Casualty Co., supra,* the facts are clear that the agreement Dixon and Harris was an arms-length transaction between *independent* parties.

Bushman Construction Co. v. Conner (10th Cir. 1962), 307 F. 2d 888 (cited in Reply Br. p. 26), involved a joint venture and hence is irrelevant to this action, as the trial testimony negates the existence of any such relationship (Op. Br. pp. 20-21).

Paramount contends that "technical" contract arguments should not be allowed to interfere with the "remedial" nature of the Miller Act, apparently on the theory that this court should allow full recovery of all losses by subcontractors. The Supreme Court in *Clifford F. MacEvoy Co. v. United States, supra,* however, held otherwise.

Conclusion.

The decision in *MacEvoy Co. v. United States, supra,* clearly precludes Paramount from recovering on the Miller Act bond provided by appellants.

Respectfully submitted,

THELEN, MARRIN, JOHNSON & BRIDGES,
JAMES W. BALDWIN,
ROBERT K. WORRELL,
ANDREW J. NOCAS,
Attorneys for Appellants, L. E. Dixon Company and Fidelity and Deposit Company of Maryland.

Certificate.

I certify that, in connection with the preparation of this brief, I examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

James W. Baldwin